



1960

Real Property - Tenancy by the Entirety - Interest of Surviving Co-Tenant in Executory Contract for Sale of Land

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Recommended Citation

Alm, Fredrick R. III (1960) "Real Property - Tenancy by the Entirety - Interest of Surviving Co-Tenant in Executory Contract for Sale of Land," *North Dakota Law Review*. Vol. 36 : No. 3 , Article 9.

Available at: <https://commons.und.edu/ndlr/vol36/iss3/9>

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scribers.²¹ It seems that the English point of view—that their only true duty is to their own self-interest, and consequently that they should not be allowed any privilege—is by far the sounder.

A recent American criticism of the doctrine of qualified privilege for credit agencies felt that it should be restricted to non-negligent reports.²² As one court stated this could be done by the legal fiction of implied malice, or by an honest test of due care and proximate cause.²³

It appears that no real harm or hinderance would be done to these agencies if they were to be held liable, as they can protect themselves both by due care and by insurance, and the welfare of the general public can best be served if these agencies are held to the same standard of care as other businesses.

DAVID FOSTER KNUTSON.

REAL PROPERTY — TENANCY BY THE ENTIRETY — INTEREST OF SURVIVING CO-TENANT IN EXECUTORY CONTRACT FOR SALE OF LAND. — A husband and wife owned property as tenants by the entirety. They entered into an executory contract for the sale of the property with the purchaser, who took possession. Before the entire purchase price was paid, the husband died intestate. The Supreme Court of Oregon held, one justice dissenting, that by operation of the doctrine of equitable conversion the surviving widow succeeded to the entire legal estate as trustee for the benefit of the purchaser. The intestate heir of her husband was entitled to one-half the proceeds from the sale of the property and the surviving spouse the remaining half. *Panushka v. Panushka*, 349 P.2d 450 (Ore. 1960).

The instant case is indicative of the confusion in this area of the law which seems to stem from a misguided emphasis upon the doctrine of equitable conversion.¹ Actually, the question presented is whether the right of survivorship² extends to the proceeds of an executory contract for the sale of land.³ The

21. *Macintosh v. Dun*, (1908) A.C. 390.

22. Note, *The Mercantile Agency and Conditional Privilege in Defamation*, 11 S.C.L.Q. 256 (1959) which states that "It must be remembered that reputation is inherently difficult to protect. The workings of defamatory words are insidious and deadly. Even though there may in most instances be no reason to equate want of due care with malice, where there is a private enterprise voluntarily dealing continuously in the reputation and financial standing of others by subjecting them to the scrutiny of interested subscribers, carelessness is essentially as blameworthy as a conscious and purposeful wrongdoing. If this is so, there seems no reason to be balked by verbal subtleties."

23. See *Douglass v. Daisley*, 114 Fed. 628 (1st Cir. 1902).

1. See *Stone, Equitable Conversion by Contract*, 13 Colum. L. Rev. 369 (1913); *Swenson & Degnan, Severance of Joint Tenancies*, 38 Minn. L. Rev. 466 (1954); Note, 46 Yale L. J. 1077 (1937); Comment, 37 Colum. L. Rev. 1023 (1937).

2. The right of survivorship is characteristic of both the more common modes of cotenancies, i. e., joint tenancies and tenancies by the entirety. In support of this close analogy, one authority reasons that a tenancy by the entirety is "... essentially a form of joint tenancy, modified by the common law theory that husband and wife are one person." 2 TIFFANY, REAL PROPERTY § 430 (3d ed. 1939); see *Hewitt v. Biege*, 183 Kan. 352, 327 P.2d 872 (1958); *Hill v. Breeden*, 53 Wyo. 125, 79 P.2d 482 (1938).

3. *Union & Mercantile Trust Co. v. Hudson*, 147 Ark. 7, 227 S.W. 1 (1921); *In re Baker's Estate*, 247 Iowa 1380, 78 N.W.2d 863 (1956) (5-4 decision). It seems that the few jurisdictions which uphold the majority in the instant case, do so by adopting or confirming a local rule to the effect that tenancies by the entirety do not exist in personal property. However, other courts have departed from this exception in instances where the proceeds are derived from land held by the entirety, or joint tenancy. In *Koehring v. Bowman*, 194 Ind. 433, 142 N.E. 117 (1924), it was held that "... estates by the entirety do not exist as to personal property except when such property is directly derived from real estate held by that title . . . as in proceeds arising from the sale of

court's position here is contrary to the weight of authority,⁴ and, in effect, defeats the intention of the parties in their obvious desire to hold property under a survivorship form of cotenancy.⁵

Abstract legal fictions should not be a controlling factor for the court's consideration,⁶ and when the spouses take property as joint tenants they are evincing a desire that they intend it to pass by survivorship.⁷ Accordingly, the more realistic view stems from the reasoning that the cotenancy, with the incident of survivorship, was simply an arrangement for holding their wealth,⁸ and that, in contracting to sell their land, they merely supplanted their rights in the land with their rights in the purchase money.⁹ The majority of the courts hold this position as the more tenable, and indeed, the more practical view of the problem.¹⁰

A concomitant issue, which is usually implied, is whether the incident of survivorship in the retained legal title to the land is sufficient to convey a marketable title to the purchaser.¹¹ It has been expressed that a negative ruling would create a great deal of inconvenience, and would subject all titles executed by a surviving grantor-joint tenant to a very dubious position.¹²

property so held." (Emphasis added). *Accord*, *Detroit & Security Trust Co. v. Kramer*, 247 Mich. 468, 226 N.W. 234 (1929); *Foy v. King*, 248 Mich. 650, 227 N.W. 541 (1929).

4. *Commissioner v. Hart*, 76 F.2d 864 (6th Cir. 1935); *Ciconte v. Barba*, 19 Del. Ch. 6, 161 Atl. 925 (1932); *Tingle v. Hornsby*, 111 So.2d 274 (Fla. 1959); *Watson v. Watson*, 5 Ill.2d 526, 126 N.E.2d 220 (1955); *Hewitt v. Biege*, 183 Kan. 352, 327 P.2d 872 (1958); *Boland v. McKowen*, 189 Mass. 563, 76 N.E. 206 (1905); *Foy v. King*, *supra* note 3; *McElroy v. Lynch*, 232 S.W.2d 507 (Mo. 1950); *In re* 115th and *Vistula Aves., etc.*, 137 Misc. Rep. 358, 242 N.Y.Supp. 6 (1930); *In re Bramberry's Estate*, 156 Pa. 628, 27 Atl. 405 (1893); *Simon v. Chartier*, 250 Wis. 642, 27 N.W.2d 752 (1947).

5. *In re Bramberry's Estate*, *supra* note 4, at 408, ". . . and when, on a sale of land so held, they take in their joint names an obligation for the purchase money, the presumption is that they intend to hold the latter as they did the former". And in the dissenting opinion of the Iowa court in *In re Baker's Estate*, 247 Iowa 1380, 78 N.W.2d 863, 876 (1956) the Court declared that ". . . a mortgage taken in the joint names of husband and wife, on the sale of land held . . . by the entirety, is presumed to be held by the same estate, so that, in the absence of evidence showing an intended division, the survivor becomes the sole owner, and the administrator of the deceased spouse has no interest therein".

6. The court, here, felt impelled to use the doctrine of equitable conversion, but this doctrine should only be employed in instances where it will carry out the intention of the parties. *Detroit & Security Trust Co. v. Kramer*, 247 Mich. 468, 226 N.W. 234 (1929); *Kurovski v. Retail Hardware Mut. Fire Ins. Co.*, 203 Wis. 644, 234 N.W. 900 (1931).

7. An excellent example of a court's protection of the right of survivorship is *In re Maguire's Estate*, 251 App. Div. 337, 296 N.Y.Supp. 528, *aff'd*, 277 N.Y. 527, 13 N.E.2d 458 (1937).

8. See generally *Swenson & Degnan*, *op. cit. supra* note 1, at 477; Note, 41 Cornell L. Q. at 160 (1956).

9. Thus, the change in the form of the property should not affect the manner in which it is held, and an executory contract for the sale of realty held subject to survivorship might operate as ". . . a transmutation of the property from real to personal, but did not change the character of the estate. . ." *Citizens Savings Bank & Trust Co. v. Jenkins*, 91 Vt. 13, 99 Atl. 250 (1916).

10. *Ciconte v. Barba*, 19 Del. Ch. 34, 161 Atl. 925 (1932); *Detroit & Security Trust Co. v. Kramer*, 247 Mich. 468, 226 N.W. 234 (1929); *McArthur v. Weaver*, 129 App. Div. 743, 113 N.Y.Supp. 1095 (1909). In context with this view, the California Supreme Court provided a good statement of the general rule: "The proceeds of joint tenancy property, in the absence of contrary agreement, retain the character of the property from which they are acquired." *Fish v. Security—First National Bank*, 31 Cal.2d 378, 189 P.2d 10 (1948).

11. *Swenson & Degnan, Severance of Joint Tenancies*, 38 Minn. L. Rev. 466 (1954).

12. *In re Baker's Estate*, 247 Iowa 1380, 78 N.W.2d 863 (1956) (see dissenting opinion); see *Swenson & Degnan, supra* note 11, at 475, where it is pointed out that if the surviving joint tenant cannot convey a marketable title it will wreak disaster on land titles executed by them. It further reasons that the ". . . implication is that a conveyance by the wife will not suffice; conveyance will also have to be obtained from the adminis-

The vendor, in an executory contract, holds the legal title as security for enforcing the conditions of the contract.¹³ Thus, since he is entitled to discharge the obligation when payment is made,¹⁴ he should also be enabled to execute a marketable title pursuant to the contract.¹⁵

Although the question raised has not been resolved in this jurisdiction, the North Dakota Title Standards Committee has ruled that since there is a divergence of authorities in other states raising a reasonable doubt about the validity of a conveyance by the survivor, the surviving co-tenant does not possess a marketable title.¹⁶ It is submitted that this ruling should not be relied upon by North Dakota lawyers as it is contrary to the holdings of the better reasoned decisions. Furthermore, it seems that the tendency of this jurisdiction is in the direction posited herein.¹⁷

FREDRICK R. ALM III.

SEARCHES AND SEIZURES — SEARCH WARRANTS AND EXECUTION THEREOF — DESCRIPTION OF PLACES, PERSONS, OR THINGS IN AFFIDAVITS OR WARRANTS. — Defendant was convicted of possession of liquor in a dry area for purpose of sale. He appealed to the Court of Criminal Appeals contending that the search warrant authorized search of the "Cotton Club" located on "Slaton Highway No. 84", and although there was but one Cotton Club in the county, said highway did not exist, and the misdescription rendered the warrant invalid. The court *held* that all that is required to validate a search warrant is that there be sufficient definiteness to enable the officer to locate the property and distinguish it from other places in the community. The dissenting judge argued that if both state and federal constitutional guarantees against unreasonable and unlawful search and seizure are yet in force, the erroneous description in the search warrant precluded the receipt in evidence of the results of the search.¹ *McCormick v. State*, 331 S.W.2d 307 (Tex. 1960).

The Constitution of Texas requires the person or thing seized to be described "as near as may be".² Both the Constitution of the United States and the Constitution of North Dakota require "particularly describing" the

trator, beneficiaries, heirs or creditors of the husband . . . the clear implication—relating to titles is disastrous . . . if the majority opinion prevails, these titles (executed by surviving grantor-joint tenants) are now highly suspect."

13. *Schauble v. Schulz*, 137 Fed. 389 (8th Cir. 1905), where the court states, ". . . it is also the accepted rule in the state of North Dakota . . . that the vendor holds the legal title in trust. . . ." *Accord*; *In re Briebach's Estate*, 132 Mont. 437, 318 P.2d 223 (1957) (vendor holds the title of the realty as security); *Semmler v. Beulah Coal Mining Co.*, 48 N.D. 1011, 188 N.W. 310 (1922) "In equity, the estate is measured as a fee subject to the vendor's lien."

14. *McArthur v. Weaver*, 129 App. Div. 743, 113 N.Y.Supp. 1095 (1909); see *Swenson & Degnan, Severance of Joint Tenancies*, 38 Minn. L. Rev. 466 (1954).

15. See authorities cited in note 14, *supra*.

16. N.D. State Bar Title Standards Committee § 1.12 (1954). For a sharp criticism of this point, see *Swenson & Degnan, Severance of Joint Tenancies*, 38 Minn. L. Rev. 466 (1954).

17. *In re Kaspari's Estate*, 71 N.W.2d 558 (N.D. 1955) (" . . . title to the house . . . vested in Inez Mae Kaspari as the surviving joint tenant under the joint tenancy survivorship deed. . . ."); *cf. Johnson v. Johnson*, 85 N.W.2d 211, 224 (N.D. 1957) (citing *In re Kaspari's Estate, supra*).

1. Judge Davidson relied on *Balch v. State*, 134 Tex. Crim. 327, 115 S.W.2d 676 (1938) wherein the warrant described the premises to be searched as "302 East Robbins St", while the premises searched were at "304 Robbins St." See also: *Ervin v. State*, 165 Tex. Crim. 391, 307 S.W.2d 955 (1957); *Childress v. State*, 163 Tex. Crim. 479, 294 S.W.2d 110 (1956).

2. Tex. Const. art. I, § 9.